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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

HERBERT LAWRENCE RASCON,

Defendant and Appellant.

C061132

(Super. Ct. No. SF110380A)

After walking out of a store without paying for items he had concealed in his clothing, defendant Herbert Lawrence Rascon pled guilty to petty theft with a prior theft conviction. (Pen. Code, § 666.)<sup>1</sup> In accordance with the plea agreement, the remaining charges were dismissed, and defendant was placed on felony probation and ordered to serve one year in county jail.

Defendant appeals, claiming the trial court erred by imposing a \$20 "surcharge" on the restitution fine, by failing

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<sup>1</sup> Hereafter, undesignated statutory references are to the Penal Code.

to set forth the statutory authority for the fines imposed, and by failing to award conduct credits. As the minute order from defendant's sentencing does not specify the bases for the \$20 surcharge and a security fee imposed by the trial court, we shall remand for the trial court to set forth the bases for these sums. We also find merit in defendant's claim regarding conduct credit.

## **DISCUSSION**

### **I.**

The trial court ordered defendant to pay a restitution fine of \$200 "plus surcharges," and a \$20 "surcharge" is noted on the minute order from defendant's sentencing. Defendant argues that, pursuant to section 1202.4, subdivision (e), a surcharge may not be imposed on a restitution fine and, consequently, the surcharge imposed in this matter must be stricken. Although it does not appear the trial court imposed the \$20 surcharge pursuant to this subdivision of section 1202.4, the court did not specify the basis for imposing this sum. This was error.

Section 1202.4, subdivision (e) states, in part, that a restitution fine "shall not be subject to . . . the state surcharge authorized in Section 1465.7 . . . ." Section 1465.7, subdivision (a), imposes "[a] state surcharge of 20 percent . . . on the base fine used to calculate the state penalty assessment . . . ." As the "surcharge" at issue here was in an amount that was 10 percent of the restitution fine, we infer it was not imposed pursuant to section 1465.7.

The People argue the surcharge was in fact a "surcharge fee" authorized under section 1202.4, subdivision (l), which provides: "At its discretion, the board of supervisors of any county may impose a fee to cover the actual administrative cost of collecting the restitution fine, not to exceed 10 percent of the amount ordered to be paid, to be added to the restitution fine and included in the order of the court, the proceeds of which shall be deposited in the general fund of the county." The People maintain that San Joaquin County has passed an order to impose such a fee.<sup>2/3</sup>

While the \$20 "surcharge" imposed by the trial court is consistent with the fee authorized under section 1202.4, subdivision (l), we cannot discern with certainty from the record before us the authority relied on by the court for imposing this sum. The matter must be remanded for the trial court to provide clarification in this regard.

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<sup>2</sup> The People have not asked us to take judicial notice of the order of the San Joaquin County Board of Supervisors to this effect or provided us a copy of it.

<sup>3</sup> It appears defendant's trial counsel also believed the "surcharge" was, in fact, the administrative fee authorized by section 1202.4, subdivision (l). When the trial court imposed the "surcharge," defense counsel argued that "the ten percent surcharge" did not apply, citing "People versus Edwards." It appears counsel was referring to *People v. Eddards* (2008) 162 Cal.App.4th 712, 715, in which this court discussed when the administrative fee provided for in section 1202.4, subdivision (l) may be imposed.

Defendant also complains that the trial court failed to state the statutory authority for other "fees, fines, and surcharges" it imposed, relying on section 1213, subdivision (b), and *People v. High* (2004) 119 Cal.App.4th 1192. Under section 1213, subdivision (b), if a minute order is used as the commitment document for a person who is granted probation, it "shall be identical in form and content to that prescribed by the Judicial Council for an abstract of judgment . . . ." *People v. High* held that an abstract of judgment must separately set forth all fines, fees and penalties. (*People v. High, supra*, at p. 1200.) We subsequently applied this requirement to a case in which the defendant was granted probation based on the provisions of section 1213, subdivision (b), and remanded the matter to amend the minute order to include the statutory bases for all fines and fees imposed. (*People v. Eddards, supra*, 162 Cal.App.4th at pp. 717-718.)

In the present matter, in addition to the restitution fine and "surcharge" previously discussed, the minute order reflects a suspended restitution fine in the amount of \$200 pursuant to section 1202.44 and a "[s]ecurity [f]ee" of \$20. Upon remand, the trial court is directed to designate the statutory basis for imposing the security fee.

## **II.**

Defendant also asserts the trial court failed to award him presentence conduct credit toward his county jail sentence. The People concede this issue, and we accept their concession. (See

§ 2900.5, subd. (d).) Pursuant to the recent amendment to section 4019, we shall order an additional 14 days of presentence conduct credit.<sup>4</sup>

**DISPOSITION**

The judgment is modified to add an additional 14 days of presentence custody credit. As modified, the judgment is affirmed, except that the matter is remanded to the trial court with directions to specify the statutory bases for the \$20 surcharge on the restitution fine and the \$20 security fee, and to amend the minute order accordingly, including the additional presentence custody credit.

CANTIL-SAKAUYE, J.

We concur:

SCOTLAND, P. J.

SIMS, J.

<sup>4</sup> Pursuant to this court's Miscellaneous Order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the issue (without additional briefing) of whether amendments to section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitle him to additional presentence credit. (Ct. App., Third App. Dist., Misc. Order No. 2010-002.) As expressed in the recent opinion in *People v. Brown* (2010) 182 Cal.App.4th 1354, we conclude that the amendments do apply to all appeals pending as of January 25, 2010. Defendant is not among the prisoners excepted from the additional accrual of credit. (§ 4019, subds. (b)(2) & (c)(2); Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 50.) Consequently, defendant having served 15 days of presentence custody, is entitled to 14 days of conduct credit.